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No. 87-1515

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

THE MAINE CENTRAL RAILROAD COMPANY
and
THE PORTLAND TERMINAL COMPANY,
Petitioners,

—*v.*—

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
THE NATIONAL MEDIATION BOARD,
Respondents.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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ARGUMENT

1. *Equal Protection*

In its petition, the Railroad requested that this Court review the question of whether heightened scrutiny should apply when Congress passes special legislation, like the statute in issue here, 100 Stat. 987 (1986) (the "Act"), that selects a particular named individual for adverse treatment. The Railroad made the following arguments in support of its petition: (1) that Congress had undertaken such action in recent years with increasing frequency; (2) that the lower courts had taken differing approaches to such legislation; and (3) that the decisions of this Court supported the proposition that heightened scrutiny should apply to such legislation because the political protections that justify the rational basis test do not obtain when Congress selects a single person for adverse treatment.

Subsequent to the filing of the Railroad's petition, the United States Court of Appeals for the District of Columbia decided *News America Publishing, Inc. v. FCC*, No. 88-1037, slip op. (D.C. Cir. Mar. 29, 1988). The *News America* decision supports all three reasons that the Railroad advanced in support of its petition. First, the case illustrates Congress's increasingly frequent resort to legislation adversely affecting a single individual. As the court of appeals noted, the statute at issue in *News America* — a single provision of a 471-page continuing resolution, Pub. L. No. 100-202, 101 Stat. 1329, 1329—32 (1987) — is "general in form but not in reality; [it] burden[s] a single publisher/broadcaster." *News America*, slip op. at 2.

Second, the decision in *News America* confirms that the lower courts have indeed taken divergent approaches to evaluating special legislation. In fact, the *News America* court accepted the chief argument that the Railroad advanced below, while the dissenting judge in *News America* relied in part on *Maine Central I*, 813 F.2d 484 (1st Cir.), *cert. denied*, 108 S. Ct. 91 (1987), as well as the previous

decisions that the First Circuit relied on in that case. *See News America*, dissenting op. at 1 n.2.

Third, the *News America* decision supports the Railroad's position on the merits. While both the Organization and the government attempt to distinguish that decision on the first amendment issues raised by the special legislation invalidated by *News America*, *see* BMWE br. at 10-13; Fed. mem. at 6 n.4, the point is not whether this case and *News America* are indistinguishable. Instead, the significance of *News America* is that, unlike the First Circuit (but like the district court in *Long Island Lighting Co. v. Cuomo*, 666 F. Supp. 370 (N.D.N.Y. 1987), *appeal docketed*, No. 87-7759 (2d Cir.)), the D.C. Circuit recognized the peculiar dangers inherent in special legislation:

> Congress's exclusive focus on a single party clearly implicates values similar to those behind the constitutional proscription of Bills of Attainder. The safeguards of a pluralistic political system are often absent when the legislature zeroes in on a small class of citizens. Justice Jackson's statement, concurring in *Railway Express Agency v. New York*, 336 U.S. 106 [, 112-13] (1949), is a classic . . . . Nowhere are the protections of the Equal Protection Clause more critical than when legislation singles out one or a few for uniquely disfavored treatment.

News America, slip op. at 28-29 (citations and footnote omitted).

Both respondents rely upon the familiar principle that legislatures may address perceived problems "one step at a time . . . ." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955). However, the one-step-at-a-time rationale cannot justify special legislation singling out particular individuals for burdensome treatment. For example, in *Williamson*, surely "one step at a time" was not meant to be read as "one particular optician at a time," and unlike the First Circuit, both the *News America* and *Long Island*

Lighting courts rejected the applicability of *Williamson* in the context of special legislation singling out particular individuals for adverse treatment. *Compare News America,* slip. op. at 32-33 and *Long Island Lighting,* 666 F. Supp. at 420 *with Maine Central I,* 813 F.2d at 492 and *Maine Central II,* 835 F.2d 368, 371 (1st Cir. 1987). The Railroad requests that this Court grant the Railroad's petition in order to reconcile the diverging approaches of the lower courts to this fundamental constitutional question.

2. *Due Process*

In its petition, the Railroad argued that even if rational-basis scrutiny was to be applied to the Act, the court of appeals failed to review in any meaningful way the Act's retroactive aspects. The respondents' briefs reveal that the basic question presented remains unanswered: what legitimate public purpose is rationally served by requiring the Railroad to pay $26,000 to former employees whose jobs were abolished because of the reduction in business that these employees' strike caused.

Both the Organization and the government simply repeat the court of appeals' "rationale" that since Congress's purpose was to resolve the dispute, any terms that Congress might impose that resolved all the issues in dispute would satisfy due process. Org. br. at 13-14; Fed. mem. at 7-8. But it is not enough to say that Congress desired to settle the dispute, it did settle the dispute, and therefore it acted rationally. This tautological approach to rational-basis review — where the only inquiry is whether the legislature did what it intended to do — has been expressly rejected. *See Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 441 (1982) (separate opinion of Blackmun, J.); *United States Railroad Retirement Board v. Fritz,* 449 U.S. 166, 180 (1980) (Stevens, J., concurring).

Neither the court of appeals, the Organization, or the government identify a single contribution that retroactive

protection payments make to the goal of maintaining interstate commerce. While the government claims that the Railroad is wrong in its contention that the protection payments that the Act requires are unprecedented, Fed. mem. at 8 & n.6, the government apparently misperceives the Railroad's argument.[1] The point is not that labor protection payments are unprecedented, but that *retroactive* protection payments — payments to workers whose jobs were previously abolished — are unprecedented. Neither of the cases that the government cites, *United States v. Lowden*, 308 U.S. 225 (1939), and *ICC v. Railway Labor Executives' Association*, 315 U.S. 373 (1942), involve protection payments to workers whose jobs were abolished at the time protection was imposed.

Any fair analysis demonstrates that such retroactive payments do nothing to further labor stability. In fact, they have the opposite effect. Payments to employees already furloughed as a result of their own strike cannot logically

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1. The government characterizes the retroactive protection payments imposed on the Railroad as being "comparable" to the Railroad's own bargaining proposal, which would have provided for a $20,000 protection payment. Fed. mem. at 8. Aside from the question of whether a 30% increase is "comparable," the government's comparison between the terms of the Act and the terms of the Railroad's pre-strike proposal is inaccurate. Prior to the strike, the Railroad proposed to pay $20,000 to any of the *then* currently active employees whose jobs might be *subsequently* abolished. The Organization's counter-proposal was the same, except that the payment per worker was to be $26,000. However, subsequent to these negotiations the Organization struck the Railroad, causing large business losses and significant reduction in traffic, and forcing the Railroad sharply to reduce its workforce. If Congress had provided in the Act that the Railroad make protection payments in the *future* to those employees currently active at the time of the Emergency Board's report, such an enactment might be characterized as simply enacting the Railroad's own proposal. However, the Act is far more harmful to the Railroad and beneficial to former workers than even the Organization's final pre-strike proposal, which would also have applied "to currently active employees." Thus, the Act cannot be justified by mischaracterizing its terms as simply the enactment of a slightly modified version of the Railroad's own proposal.

promote the goal of labor peace. While prospective payments might conceivably promote labor stability, *see Brotherhood of Railway & Steamship Clerks v. Railroad Retirement Board*, 239 F.2d 37, 42-43 (D.C. Cir. 1956) (Burger, J.), retroactive payments — payments *after* the strike is over and to employees terminated prior to legislative consideration of the bill mandating such payments — do not serve any conceivable public policy. *See Zobel v. Williams*, 457 U.S. 55, 61-62 (1982) (holding that payments to persons residing in state prior to the enactment of the statute did not rationally relate to goal of encouraging residence in the state). To the contrary, the Act simply mandates a transfer of private property from the Railroad to certain of its former employees, a transfer that is wholly arbitrary.

In summary, the fact remains that these retroactive protection payments serve no legitimate public purpose. This Court should grant the Railroad's petition to make it clear that the rational basis test as applied to retroactive legislation is not limited to determining that the legislature did what it intended to do.

CONCLUSION

The decision of the court below fails to identify any meaningful restriction on Congress's power to enact special legislation. This Court's intervention is necessary to restrict this dangerous practice. Accordingly, the Petition for a Writ of Certiorari should be granted.

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